Supreme Court, U. S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-106

PLEASANT RICHARD TALLY,
(a/k/a DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et al.,
Respondents.

## PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

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No.

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PLEASANT RICHARD TALLY,
(a/k/a DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, et al.,
Respondents.

---

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

---

TO THE HONORABLE, THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

The Petitioner, Pleasant Richard Tally, prays that the Supreme Court of the United States issue a Writ of Certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in Civil Action No. 78-

3694, rendered on April 24, 1979, affirming without opinion the judgment of the U.S. District Court for the Northern District of Georgia, Civil Action No. 77-2008-A, dismissing plaintiff's claim for relief.

## CITATIONS TO OPINIONS BELOW

The order of the District Court for the Northern District of Georgia granting Respondents' Motion to Dismiss Petitioner's second suit based on diversity of citizenship and the judgment of the Court dismissing the case, both entered on June 15, 1978, are unpublished but are reprinted in Appendix A, *infra*.

The opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit, entered April 24, 1979, affirming the judgment of the lower court, is unpublished but is reprinted in Appendix A, *infra*.

The Petitioner's first complaint, alleging a cause of action under 42 U.S.C. 1983, is reprinted in Appendix B for the convenience of the Court. Petitioner's second complaint is omitted but will be furnished to the Court upon request.

The order of the District Court for the Northern District of Georgia granting Respondents' Motion to Dismiss the suit under 42 U.S.C. 1983 and the judgment of the court dismissing the case, both filed on June 3, 1977, are unpublished but are reprinted in Appendix C.



The order of the District Court for the Northern District of Georgia denying Petitioner's Motion to Alter or Amend the Judgment, which was filed on June 30, 1977, is reprinted in Appendix D.

The opinion and judgment of the Fifth Circuit Court of Appeals, entered December 8, 1977, affirming the judgment of the lower court in the 42 U.S.C. 1983 action, is unpublished but is reprinted in Appendix E.

The opinion and judgment of the U.S. Court of Appeals for the Fifth Circuit denying Petitioner's petition for rehearing *en banc* in the suit under 42 U.S.C. 1983, is reprinted in Appendix F.

## JURISDICTIONAL STATEMENT

The judgment of the U.S. Court of Appeals for the Fifth Circuit was entered April 24, 1979. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED FOR REVIEW

(1) Whether the District Court erred in failing to hold that dismissal of a suit under 42 U.S.C. 1983 for failure to establish the existence of state action should be construed as a dismissal for lack of jurisdiction under F.R.C.P. 41(b) such that a second suit based on similar facts would not be barred by the doctrine of res judicata?

(2) Whether the District Court properly concluded that the claims against the private defendants in Petitioner's first suit were required to be dismissed because the state court judge, the only stage agent involved, was found to be absolutely immune to suit?

## STATEMENT OF THE CASE

The essential facts underlying this petition are summarized below, and the documents constituting and containing most of the facts as alleged, may be found in the Appendices.

Petitioner, Pleasant Richard Tally, was a shareholder of Style Crest Southeast Company, Inc., a closely-held Georgia corporation. Since the company's incorporation on November 22, 1966, he had owned 1,000 shares of its common stock, each having a par value of $1.00.

Petitioner was also under contract as an outside salesman for Style Crest and generated more than 90 percent of the company's accounts.

The other shareholders were the Petitioner's then-wife, Frances White Tally, and Homer Williams, one of the Respondents. Mrs. Tally owned 1,000 shares and Williams owned 900 shares. Each of their respective shares also had a par value of $1.00.

The company, located in Temple, Carroll County, Georgia, manufactured early American furniture and



was a subcontractor on wood products for other companies.

Mrs. Tally was president of Style Crest and vice-chairman of its board of directors; the Petitioner was vice-president and chairman of the board; and Williams was secretary-treasurer and a member of the board.

Style Crest was relatively prosperous until 1969 when a recession caused orders to decline. The Petitioner and his then-wife subsequently mortgaged their home to pay delinquent taxes owed by the corporation. However, the owners finally had to offer the corporation for sale and received more than 73 letters of intent to purchase.

The *net* value of the corporation was estimated to be $508,452.04, of which the Petitioner's share would have been approximately $174,907.50 or 34.4 percent.

It was during Style Crest's financial difficulties, which roughly coincided with Petitioner's marital difficulties, that Respondents embarked on what the Petitioner alleges was a complex scheme of fraud which underlies this Petition.

Respondent Homer Williams, the secretary-treasurer of the corporation, advised Mrs. Tally that he was capable of running the factory by himself, and that the Petitioner, who was constantly away on selling trips, was no longer needed. Williams also advised Mrs.

Tally to seek the services of Respondent William P. Johnson, an attorney in nearby Carrollton, Georgia, for the purpose of initiating divorce proceedings against the Petitioner.

On or about August 29, 1969, Mrs. Tally filed a complaint for divorce in the Superior Court of the Coweta Judicial Circuit. Judge Lamar H. Knight presided over all proceedings.

On or about September 4, 1969, before *any* order had been entered by the court making a division of property, the Respondent Johnson summoned Petitioner to his law office. In the presence of Mrs. Tally, Johnson "fired" the Petitioner, who was not then represented by an attorney, from his own corporation. The action was in violation of Ga. Code Ann. §§22-706 and 22-712 in that Petitioner was given no notice of any meeting of shareholders to discharge him, nor had a majority of stockholders even held a meeting for the purpose of discharging him. Moreover, this was a breach of the Petitioner's contract of employment with the corporation as a salesman.

On or about September 16, 1969, Judge Knight presided at a hearing for entry of an interlocutory decree of divorce. Petitioner was represented by Respondent Aubrey W. Gilbert, also an attorney. The complaint for divorce improperly implied Petitioner and his wife jointly owned 1,000 shares of stock in the corporation, when in fact, *each* owned 1,000 shares. Respondent



Johnson's recital was calculated to mislead the court into believing the Petitioner owned no interest in the corporation by himself, thereby legitimizing the illegal act of "firing" Petitioner from a corporation in which he owned 34.4 percent of the stock. Respondent Johnson further deceived the Court by falsely stating that Petitioner, in fact, owned no interest in the corporation.

The false statements were disputed by the petitioner from the witness stand, but Respondent Gilbert silenced him by advising him that no disposition of his interest in the corporation could even be made at the interlocutory hearing because no process had issued against the corporation and all its shareholders, and because no proceeding involving the corporation and its shareholders was then pending in the court.

Because of the false statements of Respondent Johnson and because of the negligence of Respondent Gilbert, Judge Knight entered an order which recited transfer of possession and control of the entire corporation to Mrs. Tally.

Respondent Johnson then induced Judge Knight to enjoin Petitioner from entering the premises of Style Crest upon threat of confinement in the common jail of Carroll County. Petitioner was thus deprived of and prevented from exercising his fundamental and constitutional right to earn a livelihood, despite his ownership of more than one-third of the shares of the corporation and despite his contract of employment with

the corporation. Respondent Gilbert did not raise a single objection to any of this.

On or about October 7, 1969, Respondent Johnson induced Mrs. Tally to enter into a contract for the sale of her interest in Style Crest to Glas-Foam, a shell corporation, whose resident agent was Respondent Williams. Of course, Williams, at that time, was also a corporate officer and part owner of Style Crest. The contract for the sale of Mrs. Tally's interest, for the sum of $65,000.00, was drawn by Respondent Johnson. Respondent Williams knew that Glas-Foam had no assets with which to pay Mrs. Tally.

Too, the contract drawn by Respondent Johnson, less than one month after Johnson had stated in court that the Petitioner owned no interest in Style Crest, recited that Petitioner did, indeed, own 1,000 shares, and that Respondent Williams owned 900 shares.

On or about February 14, 1970, Petitioner recorded a financing statement between himself, his wife and Respondent Williams on a piece of machinery for the corporation. This was done to insure he could later recover a loan of $3,000.00 which he had earlier made to the corporation. Petitioner signed the financing statement as a secured creditor.

Using insider information known and provided by Respondent Williams, and having succeeded in preventing Petitioner from working for or even entering his own factory, Respondents Williams and Johnson



realized that Style Crest could not pay its quarterly taxes of $5,000.00, which were owed to the U.S. Internal Revenue Service (I.R.S.). Consequently, Temple Manufacturing Company, a Georgia corporation, was incorporated on February 19, 1970. Respondent Johnson was president and Respondent Williams was secretary.

On February 26, 1970, the I.R.S. sold Style Crest's assets for non-payment of three quarters of taxes totaling $15,000.00. Respondent Williams, still in theory the secretary-treasurer of Style Crest, bid $15,000.00 on behalf of Temple Manufacturing Company and thus acquired all assets of Style Crest. Significantly, these taxes went unpaid for the three quarters during which Petitioner was locked out of Style Crest.

On February 26, 1970, Mrs. Tally, by her attorney, Respondent Johnson, filed suit against Glas-Foam, the shell corporation, in the City Court of Carrollton, Georgia. Specifically, she alleged a failure of consideration because of not having been tendered $65,000.00 for her interest in Style Crest. Realizing that the I.R.S. was selling Style Crest, Mrs. Tally inquired about the security of her interest and was assured by Respondent Johnson that she would prevail in her suit.

On February 28, 1970, the resident agent of Glas-Foam, Respondent Williams, who, as already noted was also secretary-treasurer of Style Crest and secretary of Temple Manufacturing Company, accepted service of process on behalf of Glas-Foam. Although Mrs. Tally acquired jurisdiction over Glas-Foam at that point, her

attorney, Respondent Johnson, never prosecuted the suit.

Because of Respondent Johnson's failure to prosecute, Petitioner was injured in that back salaries, commissions, travel expenses and loans (including the loan for $3,000.00 secured by the piece of machinery inside the Style Crest factory which was the subject of the financing statement mentioned before) was recited by Respondent Johnson as being owed to Petitioner and to be paid by Glas-Foam. Petitioner thus became a third party beneficiary to the contract between Mrs. Tally and Glas-Foam.

On March 17, 1970, Judge Knight presided at the final hearing for divorce between the Petitioner and his wife. Petitioner, at the interlocutory hearing, had been ordered to pay $120.00 per month for child support. Mrs. Tally wanted the amount increased to $150.00 at the final hearing.

Respondents Johnson and Gilbert decided that in exchange for Petitioner's agreement to accept an increase of his child support obligation to $150.00 per month, Mrs. Tally would give Petitioner a quit claim deed for three lots of real property "owned" by Style Crest. Ignorant that the three lots had been included in the assets of Style Crest, which were sold by the I.R.S. earlier, Petitioner accepted the arrangement.



Respondent Johnson knew that the three lots had already passed to his own Temple Manufacturing Company by virtue of the I.R.S. sale, and that they were subject only to the statutory 120 day equity of redemption period. Both Respondents Johnson and Williams knew that if they could prevent Petitioner from selling his "interest" in the three lots during the 120 day period, the fraudulent takeover of Style Crest by their own Temple Manufacturing Company would be complete.

From March 18 through August 24, 1970, Petitioner repeatedly asked his attorney, Respondent Gilbert, to secure from Respondent Johnson the quit claim deed. Not until August 25, 1970, after the 120 day equity of redemption period had expired, did Respondent Gilbert mail the deed to Petitioner. When Petitioner, on August 31, 1970, went to record it, he saw that the three lots described therein had already passed from the I.R.S. to Temple Manufacturing Company and had already been recorded in the Grantee Index. The conveyance from the I.R.S. to Temple Manufacturing Company had been recorded on August 24, 1970, only one day before the worthless quit claim deed was mailed to Petitioner.

Because of the fraud perpetrated by Respondents Johnson, Williams and Gilbert, Petitioner was deprived of his constitutional right to earn a livelihood and was prevented from stopping the sale of a corporation worth $531,452.04 for only $15,000.00.

On March 2, 1977, Petitioner filed suit in the U.S. District Court for the Northern District of Georgia, Atlanta Division, against Judge Knight and the three Respondents named herein, charging them with a violation of 42 U.S.C. 1983.

Jurisdiction was predicated solely on 28 U.S.C. 1343(3). Essentially, the four were accused of having conspired, under color of state law, to deprive Petitioner of his right to earn a livelihood. The state action essential for mooring Respondents Johnson, Williams and Gilbert to the suit was alleged to have existed because of the involvement of Judge Knight with whom the three were alleged to have acted in concert. Specifically, the judge was accused of having made a disposition of the corporate property of Style Crest during Petitioner's divorce *without* having had jurisdiction of the corporation; he, therefore, was alleged to have lost his judicial immunity and had become liable for damages.

Respondents Johnson, Gilbert and Knight moved to dismiss the complaint, and Respondent Williams moved for summary judgment.

The trial court dismissed the complaint against all defendants on the ground that it failed to state a cause of action. The court explained its decision in an order filed on June 3, 1977. It said, in pertinent part:

> . . . it is clear that Judge Knight had jurisdiction over the divorce proceedings . . . and was



> empowered to make a disposition of plaintiff's share holdings in Style Crest under Ga. Code Ann. §30-203. Defendant Knight is therefore immune to suit under Section 1983 . . . Defendants Gilbert and Johnson acted as the attorneys for the respective parties in the Tally's divorce action in 1969. Said defendants were thus participating in private state court litigation, were not acting under color of state law and cannot be held liable under 42 U.S.C.A. 1983. . . . Defendant Williams is a private person, not alleged to have acted under color of state law, who purportedly conspired with defendants Knight, Johnson and Gilbert to deprive plaintiff of his civil rights. A private person alleged to have conspired with persons entitled to immunity cannot be held to have acted under color of state law.

The court, citing Ga. Code Ann. §110-501, correctly noted in its order that the four requirements for determining whether a second suit is barred by the doctrine of res judicata are:

(1) Whether the prior judgment was rendered by a court of competent jurisdiction;

(2) Whether there was a final judgment on the merits;

(3) Whether the parties or those in privity with them were identical; and

(4) Whether the same cause of action was involved in both suits.

However, the court, in the first suit, failed to consider whether it even had jurisdiction and erroneously dismissed for failure to state a cause of action.

The court's decision in the first suit was subsequently affirmed without opinion by a panel of the U.S. Court of Appeals for the Fifth Circuit in Civil Action No. 77-2339 on December 8, 1977, and a petition for rehearing and suggestion for rehearing *en banc* were denied on January 6, 1978. The United States Supreme Court denied certiorari in Petition No. 77-1242 on May 1, 1978, having just decided the same question in *Stump v. Sparkman*, 98 S.Ct. 1099 (1978), *after* Petitioner herein had applied for a Writ of Certiorari.

On December 15, 1977, one week after the U.S. Court of Appeals for the Fifth Circuit affirmed the District Court's decision, Petitioner again filed suit in the U.S. District Court for the Northern District of Georgia, Atlanta Division, charging Respondents herein, among other things, with fraud, conspiracy to defraud and conversion. Jurisdiction was predicated on 28 U.S.C. 1332(a), diversity of citizenship.

Respondents moved for summary judgment, arguing that the complaint was barred by the doctrine of res judicata, and the court granted their motion.

In its order, dated June 15, 1978, the court held, in pertinent part, that the same cause of action was involved in both suits, and that the second suit was, therefore, barred because the first had been dismissed for failure to state a claim. The final judgment was entered on June 15, 1978. Petitioner moved to alter or amend the judgment, and the motion was denied on June 28, 1978.



An appeal was thereafter taken to the U.S. Court of Appeals for the Fifth Circuit which affirmed the judgment of the District Court on April 24, 1979, in Civil Action No. 78-3694.

## REASONS FOR GRANTING THE WRIT

### A. The U.S. Court Of Appeals For The Fifth Circuit Rendered A Decision In Conflict With A Previous Decision Of That Court And In Conflict With Decisions Of At Least Two Other United States Courts of Appeals.

The instant case seeks clarification of the following questions:

(a) Whether dismissal of a suit under 42 U.S.C. 1983 for failure to establish the existence of state action should be construed as a dismissal for lack of jurisdiction under F.R.C.P. 41(b) such that a second suit based on similar facts would not be barred by the doctrine of res judicata?

(b) Whether the U.S. District Court properly concluded that the claims against the private defendants in

the first suit were required to be dismissed if the state court judge, the only state agent involved, was found to be absolutely immune as asked hypothetically by this Court in *Stump v. Sparkman*, 98 S.Ct. 1099, (1978) at 1109, n. 13?

Petitioner submits that the Fifth Circuit wholly ignored the fact that state action is an essential ingredient of any suit brought under 42 U.S.C. 1983, and that without it, the District Court lacked jurisdiction in the first suit. See, *e.g., Jackson v. Metropolitan Edison Co.*, 419 U.S. 345 (1974). Therefore, the judgment of the Fifth Circuit should be reversed because of the clear mandate of Rule 41(b) of the Federal Rules of Civil Procedure, which states, in pertinent part, that:

> . . . unless the Court in its order for dismissal otherwise specified, a dismissal under this subdivision and any dismissal not provided for in this rule, *other than a dismissal for lack of jurisdiction*, for improper venue, or for failure to join a party under Rule 19, operates as an adjudication upon the merits. (Emphasis Added.)

Although the court phrased its order to read that the first suit was being dismissed for failure to state a cause of action, which would ordinarily have been an adjudication on the merits, it is obvious that because the Court lacked jurisdiction over the judge, it consequently lacked jurisdiction over the subject matter. It could not properly have rendered any decision on the



merits. This Court's recent decision in *Stump* left no doubt that the presence of a state court judge in a §1983 suit raises a threshold question of jurisdiction. The Fifth Circuit obviously failed to consider this in affirming the District Court's decision in the second suit which barred Petitioner's attempt to have his claim heard on the merits.

Moreover, the Fifth Circuit ignored its own decision in *Simmons v. Whittaker*, 252 F.2d 224 (5th Cir. 1958), in which it held that because the plaintiff had failed to establish the existence of any state action, the District Court did not have jurisdiction and the "appellant (plaintiff) should be left free, if she should desire, to pursue whatever remedies, administrative or judicial," which the laws of her state may afford her. 252 F.2d at 231.

On the other hand, this Court has raised the possibility, without deciding, that even if the only state agent involved in a multi-defendant §1983 action is found to be wholly immune to suit, it may not be necessary for a District Court to dismiss the claims against the remaining private defendants. At any rate, the question was reserved in *Stump v. Sparkman*, 98 S.Ct. 1099 (1978) at 1109, n. 13, wherein the Court noted there is presently a conflict between the First and Fifth Circuit Courts of Appeals. Compare *Kermit Construction Corp. v. Banco Credito Y Ahorro Ponceno*, 547 F.2d 1 (1st Cir. 1976), with *Guedry v. Ford*, 431 F.2d 660 (5th Cir. 1970).

Petitioner argues that the First Circuit's position is preferable inasmuch as dismissal of the claims against the private defendants would bar plaintiff from ever having his claim heard on the merits because of the perfunctory and manifestly erroneous application of res judicata.

## CONCLUSION

For the reasons set forth above, this Petition for a Writ of Certiorari should be granted to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, the undersigned counsel for Pleasant Richard Tally, do hereby certify that three copies of the foregoing Petition for Writ of Certiorari were mailed by first class mail to the counsels for the respective Respondents as shown below, with proper postage affixed, this the ____ day of July, 1979.

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JAMES S. KILPATRICK

## APPENDIX "A"

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PLEASANT RICHARD TALLY

versus C.A. No. C77-2008-A

WILLIAM P. JOHNSON, HOMER WILLIAMS,
and AUBREY W. GILBERT

*JUDGMENT*

This action came on for consideration before the Court, Honorable CHARLES A. MOYE, JR., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged that the Plaintiff, PLEASANT RICHARD TALLY, take nothing that the action be dismissed and that the Defendants WILLIAM P. JOHNSON, HOMER WILLIAMS and AUBREY W. GILBERT, recover their costs of action.

Dated at Atlanta, Georgia, this the 15th day of June, 1978.

/s/ BEN H. CARTER
Clerk of Court

/s/ ILLEGIBLE
Deputy Clerk

Filed and Entered in
Clerk's Office,
June 15, 1978.

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IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

(Number and Title Omitted)

Filed: June 15, 1978

*ORDER*

The above-styled matter is before the Court on the motions to dismiss for summary judgment filed by each of the three defendants and on the plaintiff's motion for summary judgment. The action is one for fraud arising from a divorce proceeding in Carroll County, Georgia, in 1969. The plaintiff alleges that the defendants conspired to defraud the plaintiff by depriving him of certain shares of stock and by arranging for his ex-wife to quitclaim to him valueless property in return for increased child support payments. The case arises



from the same circumstances as *Tally v. Gilbert*, Civil No. C77-359A, and the defendants contend that the action is barred by res judicata.

In a diversity action, the law of the forum state controls the application of the doctrine of res judicata. *Breeland v. Security Insurance Co.*, 421 F.2d 918 (5th Cir. 1969). The applicable provision is therefore Ga. Code Ann. §110-501, which states:

> A judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matters put in issue, or which might have been put in issue, and the cause wherein the judgment was rendered, until such judgment shall be reversed or set aside.

The requirements for res judicata, therefore, are that (1) the prior judgment must have been rendered by a court of competent jurisdiction; (2) that there must have been a final judgment on the merits; (3) that the parties or those in privity with them must be identical; and (4) that the same cause of action must be involved in both suits. In Civil Action No. C77-359A, the plaintiff sued these defendants as well as the judge who presided over the divorce proceeding; this Court dismissed the action as to all defendants for failure to state a claim. That decision was affirmed by the Fifth Circuit Court of Appeals and certiorari was denied by the United States Supreme Court on May 1, 1978. The remain-

ing question then is whether the same cause of action was involved in both suits.

The plaintiff concedes that both actions have arisen from the divorce proceeding but argues that the first action was brought for infringement upon a constitutional right under 42 U.S.C. §1983, while the second action sounds in tort.

Various tests have been set forth to determine whether or not suits arise from the same cause of action: (1) Is the same right infringed by the same wrong? (2) Would a different judgment obtained in the second action impair rights under the first action? (3) Would the same evidence sustain both judgments? *Acree v. Air Line Pilots Assoc.*, 390 F.2d 199, 201 (5th Cir. 1968). In the case cited, the Court found, "There may be some difference in the legal theory supporting the actions, but the substance, for *res judicata* purposes at least, is the same." *Id.*

That statement is applicable in the instant case. The complaints bear marked similarity, both presenting claims for fraud, both alleging a conspiracy to deprive the plaintiff of his ownership interests, and both presenting substantially the same prayers for relief.

Accordingly, the dismissal of the previous action having been on the merits under Rule 41(b), the plaintiff's claim is barred by the principles of res judicata and the defendants' motion to dismiss is hereby GRANTED.



SO ORDERED, this 15th day of June, 1978.

/s/ CHARLES A. MOYE, JR.
UNITED STATES
DISTRICT JUDGE

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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No. 78-3694
Summary Calendar*

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PLEASANT RICHARD TALLY,
Plaintiff-Appellant,

versus

WILLIAM P. JOHNSON, ET AL,
Defendant-Appellees.

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Appeal from the United States District Court for the
Northern District of Georgia

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* Rule 18, 5 Cir., Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir., 1970, 431 F.2d 409, Part I.

(APRIL 24, 1979)

Before AINSWORTH, GODBOLD and VANCE, Circuit Judges.

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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## APPENDIX "B"

*CLAIM UPON WHICH PLAINTIFF SEEKS RELIEF*

1. The Plaintiff, Pleasant Richard Tally, was a shareholder owning 1000 shares of common stock, par value $1.00 per share of Style Crest Southeast Co., Inc. (hereinafter referred to as Style Crest) since incorporation of that company on November 22, 1966. The other stockholders of the close corporation were the Plaintiff's wife, Frances Marie Tally (also known as Frances White Tally) owning 1650 shares or a majority interest of common stock, par value $1.00 per share, and the Defendant Homer Williams, owning 900 shares of common stock par value $1.00 per share. The Plaintiff was also an outside salesman for the corporation, effectively producing over 90% of the corporate accounts. Style Crest was a manufacturer of early American furniture, and subcontractor for wood items for other furniture manufacturing companies.

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1 See N.L.R.B. v. Amalgamated Clothing Workers of America, 5 Cir., 1970, 430 F.2d 966.



2. On or about May 23, 1969, the Plaintiff, Pleasant Richard Tally, and his wife, Frances White Tally, executed jointly and severally a deed to secure debt resulting in an encumbrance on one home owned by them jointly as a personal residence at 1684 Cecelia Drive, N.E., DeKalb County, Atlanta, Georgia, which was not a corporate asset. The deed to secure debt was executed in order to obtain monies to pay the back taxes owed by the corporation, Style Crest.

3. On or about August 29, 1969, Frances White Tally, by her attorney, the Defendant, William P. Johnson, filed for divorce in Superior Court, Coweta Judicial Circuit in Carroll County, Georgia, before the Defendant, Judge Lamar H. Knight.

4. On or about September 4, 1969, the Defendant William P. Johnson, summoned the Plaintiff, in this action, Pleasant Richard Tally, to his law office in Carrollton, Georgia, where in the presence of Frances White Tally, he "fired" the Plaintiff shareholder from his corporation Style Crest. Plaintiff, Pleasant Richard Tally, was not represented by legal counsel at this transaction.

5. On or about September 16, 1969, the hearing for entry of an interlocutory decree of divorce was heard before the Defendant Judge Lamar H. Knight in Superior Court, Coweta Judicial Circuit in Carrollton County, Georgia. The Plaintiff in

this action, Pleasant Richard Tally, was, at this hearing, represented by the Defendant Aubrey W. Gilbert acting as his legal counsel. At this hearing, actual fraudulent statements were made by the Defendant William P. Johnson, to the Defendant Lamar H. Knight to the effect that the Plaintiff, Pleasant Richard Tally owned no shareholder interest in Style Crest, despite the fact that the face of the petition for divorce drawn by the Defendant William P. Johnson submitted to the Defendant Lamar H. Knight recited the Plaintiff Pleasant Richard Tally's $1000.00 worth of stock in Style Crest. The fraudulent statements were disputed by the Plaintiff Pleasant Richard Tally from the witness stand and the Defendant Aubrey W. Gilbert assured the Plaintiff, Pleasant Richard Tally, that no disposition could be made of the corporation or the Plaintiff's shareholder interest in Style Crest.

The Defendant, Judge Lamar H. Knight under color of state authority, in a state proceeding for divorce, without subject matter jurisdiction of the corporation, Style Crest, or of all the shareholders thereof, and without notice or opportunity to be heard as to the respective civil rights of the Plaintiff in this action, Pleasant Richard Tally, as required by the substantive and procedural due process provisions of the 14th Amendment of the United States Constitution and 42 U.S.C. §1983, did deliberately and unconstitutionally transfer



possession and control of the entire interest in Style Crest to Frances White Tally, the plaintiff in the state proceeding for divorce.

The Defendant, Judge Lamar H. Knight did further, in open court, verbally, restrain the Plaintiff in this action, Pleasant Richard Tally from entering the premises of Style Crest, by court order on pain of incarceration in effect locking the Plaintiff, Pleasant Richard Tally out of Style Crest and thus depriving the Plaintiff of his constitutionally protected property right — the right to earn a living as a furniture salesman for Style Crest — which was protected and secured by the Plaintiff's ownership of 1000 shares of stock in Style Crest. The Defendant, Aubrey W. Gilbert, then representing the Plaintiff, Pleasant Richard Tally, did not protest this deprivation by fraud of the constitutional right to earn a living and enjoy ownership of stock in Style Crest, perpetrated by the Defendant William P. Johnson and compounded by the Defendant Judge Lamar H. Knight.

The Plaintiff, Pleasant Richard Tally had no opportunity to secure and produce evidence of his ownership of stock, namely the stock certificate evidencing his 1000 shareholder interest in Style Crest. The Court had only subject matter jurisdiction of the parties for purposes of the pending divorce proceeding, yet the Interlocutory decree

of divorce recited that possession and control of Style Crest were transferred to Frances White Tally. This action on the part of the Defendant Judge Lamar H. Knight, effecting disposition of Style Crest, its shareholders' interests which thereby deprived Plaintiff Pleasant Richard Tally of his right to earn a living should he attempt to pursue his livelihood by returning to the premises of Style Crest, under a present imminent threat of confinement in a State jail for contempt of Court rendered this aspect of the decision in the divorce proceeding a complete judicial nullity. Such State action, being null and void, completely stripped the Defendant, Judge Lamar H. Knight of any judicial immunity.

6. On or about February 26, 1970, Frances White Tally, by her attorney, the Defendant William P. Johnson, filed a civil action in the City Court of Carrollton Georgia styled "Frances W. Tally v. Glas-Foam Corporation, John R. Creighton, and Leslie D. Igleheart" Civil Action No. 3310. The suit alleged breach of contract for failure of Glas-Foam Corporation to tender $65,000 after transfer by Frances White Tally of her majority interest in Style Crest. The fact of the contract between Frances White Tally and Glas-Foam Corporation, executed October 7, 1969, recited the Plaintiff's, Pleasant Richard Tally, shareholder interest, i.e., 1000 shares of Style Crest.



7. On or about February 26, 1970, the United States Internal Revenue Service sold the machinery, buildings and land owned by Style Crest to pay back taxes. The Defendant, Homer Williams, Secretary-Treasurer of Style Crest in breach of his fiduciary duty to Style Crest was the only bidder, bidding $15,000 for all Style Crest assets on behalf of Temple Manufacturing Company whose corporate officers are the Defendants William P. Johnson and Homer Williams.

8. On or about March 17, 1970, the final decree of divorce between Frances White Tally and Plaintiff in this action, Pleasant Richard Tally was entered by the Defendant Judge Lamar H. Knight in the Superior Court in Carrollton, Georgia. No further testimony was taken prior to entry of the final decree of divorce; however, the Plaintiff, Pleasant Richard Tally was induced to make an increase in child support from $120.00 per month awarded in the interlocutory decree to $150.00 per month in the final decree. Such increase was negotiated by Plaintiff's legal counsel in that action for divorce, Defendant Aubrey W. Gilbert with the Defendant William P. Johnson, legal counsel for Frances White Tally in that action for divorce, for and in consideration of a quitclaim deed for three lots (real property) owned by the corporation Style Crest, whose total assets had been sold by the Internal Revenue Service to the Defendants William P. Johnson and Homer

Williams, officers of Temple Manufacturing Co. on February 26, 1970. The modification of the child support provision was suggested by William P. Johnson with intent to defraud the Plaintiff in this action Pleasant Richard Tally, in that the quitclaim deed could pass no interest to Pleasant Richard Tally. Defendant Judge Lamar H. Knight made the modification a part of the final decree of divorce.

9. On or about August 25, 1970, the quitclaim deed, mentioned in the preceding paragraph, was mailed by the Defendant Aubrey W. Gilbert to the Plaintiff, Pleasant Richard Tally. When the Plaintiff, Pleasant Richard Tally went to record the quitclaim deed at the Carroll County Courthouse on August 31, 1970, he discovered that the conveyance evidenced by the quitclaim deed was preceded in the Grantee Index by recordation of a conveyance from the Internal Revenue Service to Temple Manufacturing Company whose officers are the Defendants William P. Johnson and Homer Williams, the I.R.S. conveyance being recorded by them on August 24, 1970.

10. The Plaintiff, Pleasant Richard Tally, due to the fraud perpetrated by the Defendants, under color of state authority, was deprived of his civil rights under 42 U.S.C. §1983 in violation of due process of law guaranteed by the 14th Amendment to the United States Constitution, and as a direct result



was unemployed from August 31, 1969 until February 15, 1973 when he finally obtained work with Bendix Corporation — not as a salesman. The Plaintiff, Pleasant Richard Tally has never been able to return to work as an outside salesman of furniture.

11. The Plaintiff, Pleasant Richard Tally remains obligated to this day to pay monthly installments on the deed to secure debt (noted in paragraph 2 which had been executed to obtain monies to pay back corporate taxes of Style Crest) ranging from $118.00 to $93.04 per month.

12. The Plaintiff, Pleasant Richard Tally's constitutional right of "liberty" has been abridged. The deprivation of the right to earn a living, plus the stigma of having to state to subsequent prospective employers that he, Pleasant Richard Tally, had been "fired" from his own corporation, Style Crest, equals the liberty interest envisioned and protectable under 42 U.S.C. §1983.

WHEREFORE PLAINTIFF prays that this Court grant the following relief:

(1) an accounting of the corporate assets of Style Crest;

(2) payment of lost dividends of his shareholder interest in Style Crest from the time that he was "fired", measured by the

net profit of Temple Manufacturing Company;

(3) $700,000 in compensatory damages (wages, commissions, salary, bonuses, lost earnings, unpaid expenses, etc.) plus be paid to him;

(4) $60,000 in attorneys fees or reasonable attorney's fees be paid to him;

(5) punitive damages be assessed;

(6) and any other legal or equitable relief deemed by this Court to be just and appropriate

(7) that all damages and relief be assessed against each and all defendants, jointly and severally.

by Counsel for Plaintiff

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## APPENDIX "C"

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

PLEASANT RICHARD TALLY a/k/a DICK TALLY

versus C.A. No. C77-359-A

WILLIAM P. JOHNSON, HOMER WILLIAMS, AUBREY W. GILBERT and LAMAR H. KNIGHT

*JUDGMENT*

This action came on for consideration before the Court, Honorable CHARLES A. MOYE, JR., United States District Judge, presiding, and the issues having been duly considered and a decision having been duly rendered,

It is Ordered and Adjudged the plaintiff, PLEASANT RICHARD TALLY a/k/a DICK TALLY, take nothing, that the action be dismissed and that the defendants' WILLIAM P. JOHNSON, HOMER WILLIAMS, AUBREY W. GILBERT AND LAMAR H. KNIGHT, recover their costs of action.

Dated at Atlanta, Georgia, this 3rd day of June, 1977.

BEN H. CARTER
Clerk of Court

/s/ DORIS WYNEM
Deputy Clerk

Filed and entered in
Clerk's Office
this 3rd day of June, 1977

---

*ORDER*

(Number and Title Omitted)

Filed: June 3, 1977

This is an action for violation of plaintiff's civil rights under 42 U.S.C. §1983. The case is presently before the Court on the motions of defendants William P. Johnson, Aubrey W. Gilbert, and Lamar H. Knight to dismiss the complaint, on defendant Homer Williams's motion for summary judgment, on defendants Johnson and Gilbert's motion for change of venue, and on the plaintiff's motion for contempt as to defendant Williams.

Plaintiff Pleasant Richard Tally alleges that in 1969 he and his former wife, Frances W. Tally, each owned



1,000 shares of common stock of Style Crest Southeast Co., Inc. (Style Crest) shares, and that defendant Homer Williams owned 900 shares of said stock. Frances Tally filed for divorce in the Superior Court of Coweta County, Georgia, on August 31, 1969. On September 4, 1969, plaintiff was allegedly terminated from his job as salesman for Style Crest by defendant William P. Johnson, Frances Tally's attorney. In the divorce proceeding held on September 16, 1969, the defendant Superior Court judge, Lamar H. Knight, awarded plaintiff's interest in Style Crest to Frances Tally and ordered the plaintiff to refrain from entering the premises of the corporation. Plaintiff claims that all defendants conspired in the divorce proceeding to deprive him of the constitutional right to earn a living.

The Court finds that the motion to dismiss of defendants Knight, Gilbert, and Johnson must be granted. Despite plaintiff's claims to the contrary, it is clear that Judge Knight had jurisdiction over the divorce proceedings in question and was empowered to make a disposition of plaintiff's share holdings in Style Crest under Ga. Code Ann. §30-203. Defendant Knight is therefore immune to suit under section 1983. *Pierson v. Ray*, 386 U.S. 547 (1967); *Bradley v. Fisher*, 80 U.S. (13 Wall.) 335 (1871); *Williams v. Sepe*, 487 F.2d 913 (5th Cir. 1973).

Defendants Gilbert and Johnson acted as the attorneys for the respective parties in the Tally divorce

action in 1969. Said defendants were thus participating in private state court litigation, were not acting under color of state law, and cannot be held liable under 42 U.S.C. §1983. *Hill v. McClellan*, 490 F.2d 859 (5th Cir. 1974). Plaintiff argues that the attorneys' immunity is derivative of the judge's and cannot be sustained where the judge acted outside of his jurisdiction. In view of the Court's finding that the judge acted within his jurisdiction, however, this claim is not meritorious. Accordingly, the motions to dismiss of defendants Knight, Johnson, and Gilbert are hereby GRANTED.

Defendant Homer Williams files a motion for summary judgment asking that plaintiff's complaint be dismissed for failure to state a claim upon which relief can be granted. The motion is hereby construed as a motion to dismiss. The motion is GRANTED. Defendant Williams is a private person, not alleged to have acted under color of state law, who purportedly conspired with defendants Knight, Johnson, and Gilbert to deprive plaintiff of his civil rights. A private person alleged to have conspired with persons entitled to immunity cannot be held to have acted under color of state law. *Hill v. McClellan*, 490 F.2d 859, 860 (5th Cir. 1974); *Guedry v. Ford*, 431 F.2d 660, 664 (5th Cir. 1970). Plaintiff therefore states no cause of action against Homer Williams.

In view of the disposition of the above motions, the motion for change of venue is moot. The plaintiff's motion for a finding that Homer Williams is in contempt of



Court is DENIED. The Court finds on the basis of Mr. Williams's affidavit that he believed facts as represented by him in his first affidavit to be true.

The Court finds that plaintiff has failed to state a cause of action against any of the defendants and the complaint is hereby ORDERED DISMISSED.

SO ORDERED, this 1 day of June, 1977.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT
JUDGE

---

## APPENDIX "D"

*ORDER*

(Number and Title Omitted)

This case is presently before the Court on the plaintiff's motion to alter or amend the judgment and on the plaintiff's motion to stay the judgment for costs pending appeal to the Fifth Circuit. The motion to alter or amend is DENIED. The plaintiff's remedy, assuming an error on the part of Judge Knight, was an appeal of the order, not a civil rights action against the judge. *Pierson v. Ray*, 386 U.S. 547 (1967).

The plaintiff's motion to stay the judgment for costs pending appeal is hereby GRANTED.

SO ORDERED, this 28 day of June, 1977.

/s/ CHARLES A. MOYE, JR.
UNITED STATES DISTRICT JUDGE

[Filed: JUN. 30, 1977]

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## APPENDIX "E"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

---

No. 77-2339
Summary Calendar*

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PLEASANT RICHARD TALLY,
a/k/a Dick Tally,
Plaintiff-Appellant,

versus

WILLIAM P. JOHNSON, ET AL.,
Defendants-Appellees.

---

* Rule 18, 5 Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al., 5 Cir. 1970, 431 F.2d 409, Part I.



Appeal from the United States District Court for the Northern District of Georgia

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(December 8, 1977)

Before GOLDBERG, CLARK and FAY, Circuit Judges

PER CURIAM: AFFIRMED. See Local Rule 21.[1]

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## APPENDIX "F"

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

Office of the Clerk

January 6, 1978

TO ALL PARTIES LISTED BELOW:

NO. 77-2339 — Pleasant Richard Tally, etc.
versus
William P. Johnson, et al

Dear Counsel:

This is to advise that an order has this day been entered denying the petition for rehearing, and no

---

1 See NLRB v. Amalgamated Clothing Workers of America, 5 Cir. 1970, 430 F.2d 966.

member of the panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH,
Clerk

/s/ R. ADELINE BARNES
Deputy Clerk

Mr. Richard A. Straser
Miss Carole S. Holman
Mr. Sam D. Price
Mr. J. Eugene Beckham, Jr.
Mr. David H. Tisinger
Mr. Thomas E. Greer
Mr. Charles L. Goodson
Mr. Don A. Langham

Supreme Court, U. S.
FILED
AUG 17 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979

## No. 79-106

PLEASANT RICHARD TALLY,
(a/k/a DICK TALLY),

Petitioner,

versus

WILLIAM P. JOHNSON, HOMER WILLIAMS
AND AUBREY W. GILBERT, DECEASED,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

## BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON, HOMER WILLIAMS AND AUBREY W. GILBERT IN OPPOSITION

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1979

No. 79-106

PLEASANT RICHARD TALLY,
(a/k/a DICK TALLY),
Petitioner,

versus

WILLIAM P. JOHNSON, HOMER WILLIAMS AND AUBREY W. GILBERT, DECEASED,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

# BRIEF OF RESPONDENTS, WILLIAM P. JOHNSON, HOMER WILLIAMS AND AUBREY W. GILBERT, IN OPPOSITION

TO THE HONORABLE: THE CHIEF JUSTICE AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondents, Aubrey W. Gilbert, deceased, William P. Johnson and Homer Williams, respectfully request that the Supreme Court of the United States deny the Petition for a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Fifth Circuit in Civil Action File No. 78-3694, rendered on April 24, 1979.

## OPINIONS BELOW

The Order of the District Court of the Northern District of Georgia granting Respondents' motion to dismiss Petitioner's second suit and the Judgment of the Court dismissing that case entered on June 15, 1978, are found in Appendix A of Petitioner's Brief.

The Opinion and Judgment of the United States Court of Appeals for the Fifth Circuit entered on April 24, 1979, affirming the Judgment of the District Court in the case identified above is found in Petitioner's Brief in Appendix A.

## JURISDICTION

Respondents respectfully submit that while Petitioner may apply for a Writ of Certiorari in the present case the present matter is not a proper case for the granting of a petition for a Writ of Certiorari. The Fifth Circuit Court of Appeals properly applied the state law of the State of Georgia on the issue of res judicata as controlling in cases of this type and the Petitioner's



belated reliance on *Stump v. Sparkman*, 98 S.Ct. 1099 (1978), is misplaced and belated having been dealt with by both the Fifth Circuit Court of Appeals and this Court in the initial lawsuit. Elaboration on the position taken by the Respondents is reserved for the Argument and Citation portion of this Brief.

## FEDERAL STATUTES

*Federal Rules of Civil Procedure*, Rule 12(b)(6) which provides:

> *"Rule 12. Defenses and Objections — When and How Presented By Pleading or Motion — Motion for Judgment on Pleadings*
>
> *(b) How Presented.* Every defense, in law or fact, to a claim for relief in any pleading, whether a claim, counterclaim, crossclaim, or third-party claim, shall be asserted in the responsive pleading thereto if one is required, except that the following defenses may at the option of the pleader be made by motion: . . . (6) failure to state a claim upon which relief can be granted, . . ."

## STATEMENT OF THE CASE

### (a) The Proceedings Below:

The Petitioner's statement of the proceedings below are incomplete in many respects and inaccurate in at least one glaring respect. The Respondents will first make an effort to complete a Statement of the Proceedings Below.

The present action is the second action filed by the Petitioner against all three Respondents named above. Both actions were filed in the United States District Court for the Northern District of Georgia. (R-5, 335) In both actions, the Petitioner sought to recover damages he contends he suffered as a result of legal representation by two of the Respondents named above (William P. Johnson and Aubrey W. Gilbert) of himself and his wife in a State Court divorce action. (R-5, 335) It has never been denied in any of the pleadings filed in either suit that both of these actions arise from the same transaction and, in fact, the Trial Court's Order in the present case dismissing the Petitioner's Complaint enters a finding that Petitioner conceded that both actions arose from the same divorce proceeding. (R-944)

The first suit filed by the Petitioner was filed on March 2, 1977, and as amended, named as defendants the three Respondents identified above plus State Court Judge Lamar Knight. (R-335) That action is identified in the United States District Court for the Northern District of Georgia as Civil Action Case No. C77-359A. A copy of that first Complaint, as amended, is found in the Record at R-335. In that first action the Petitioner contended that the named defendants (Respondents herein), in the handling of the Petitioner's divorce action in the Superior Court of Carroll County, Georgia, defrauded the Petitioner and Petitioner based his claim on *42 United States Code 1983*, a civil rights section. (R-335) The United States District Court for the Northern District of Georgia dismissed



that first Complaint for failure to state a claim upon which relief could be granted as to all defendants. A copy of the Court's ruling in the first case is found in the Record at R-343. The United States Court of Appeals for the Fifth Circuit summarily affirmed the dismissal and the United States Supreme Court denied Petitioner's Petition for Certiorari. (R-346) In December of 1977, the Petitioner filed his second action, naming once again the three Respondents identified herein as defendants. (R-5) This action is identified for the United States District Court for the Northern District of Georgia as Civil Action Case No. C77-2008 A. (R-5) As in the first action, Petitioner again sought to recover damages which he contended occurred as a result of the legal representation afforded him and his wife in a divorce action in the Superior Court of Carroll County, Georgia. (R-5) The identical qualities of the two Complaints will be presented in detail in the *Argument and Citation* portion of this Brief.

On June 15, 1978, the United States District Court for the Northern District of Georgia granted Motions for Summary Judgment on behalf of all Respondents and dismissed this second action ruling in essence that the claim was barred under the *Doctrine of Res Judicata*. (R-944) Petitioner's Motion to Alter or Amend the Judgment was denied. (R-972) The United States Court of Appeals for the Fifth Circuit affirmed the Judgment of the District Court on April 24, 1979.

Petitioner contends that the first action is not a bar to the second action because the dismissal in the first ac-

tion for failure to state a claim upon which relief could be granted was, in his contention, jurisdictional. The Respondents will expect to demonstrate by this Brief that not only has the Petitioner misanalyzed the law, but Petitioner has misanalyzed the issue. Respondents will demonstrate that the issues of res judicata and collateral estoppel are controlled by applicable State law, a fact with which Petitioner has never dealt and that it was abundantly clear to the Trial Court and is abundantly clear now that under applicable Georgia Law with regard to res judicata, the present Complaint cannot be maintained.

Secondly, Respondents wish to point out to the Court that there is a glaring discrepancy in the Petitioner's Statement of the Proceedings Below. Petitioner contends in his Brief that the first action was dismissed by the Trial Court on the sole ground that it failed to state a cause of action merely because the Judge was found to be immune to suit. That is grossly inaccurate. The Trial Court's Order in the first case is found at R-343, and speaks for itself. That Order makes it abundantly clear that the Respondents' Motions were granted because they were private parties participating in private State Court litigation and were not acting under color of law and could not be held liable under *42 United States Code 1983*. (R-343).



**(b) The Statement of Facts:**

A correction of Petitioner's Statement of the Case defies performance. In the first instance, for purposes of this present appeal, a lengthy Statement of the Case is not necessary since a procedural issue is involved. However, more importantly the facts presented by the Petitioner were inappropriately presented in that there are absolutely no citations to the place in the Record where those facts are established and in essence, the facts are nothing more than bare conclusions and a recitation of the Petitioner's Complaint. (See Petitioner's Brief)

Respondents respectfully submit that Statement of the Case is only necessary in the present appeal to the extent that they show the identical nature, or the absence of an identical nature, between the two Complaints and therefore the appropriateness of the utilization of the *Doctrine of Res Judicata* by the Trial Court. The Respondents refuse to encumber this Court with a naked recitation of the contentions contained in the Respondents' answers which would be the only means of responding to the paragraph by paragraph recitation of Petitioner's bare conclusions with regard to the facts in this case.

Consequently, Respondents will simply, in the Argument and Citation portion of this Brief, provide the Court with the facts (and their location in the Record) necessary to demonstrate the identical nature of these

two Complaints and the appropriateness of the Court's ruling in barring the second Complaint on the theory of res judicata.

## SUMMARY OF ARGUMENT

The Court below properly granted the Respondents' Motions for Summary Judgment and properly ruled that the present Complaint is barred by the *Doctrine of Res Judicata*. The two Complaints filed by the Petitioner are identical even down to the prayers for relief, arise from the same set of facts, and contain the same contentions and name the same parties.

In a diversity action in the United States District Court the issues of res judicata, collateral estoppel and estoppel by judgment are governed by the applicable State law. The applicable Georgia Law on the Doctrine of Res Judicata serves as a bar to the present action by the Petitioner. All of the requirements of the Georgia Statute are met; there was a prior Judgment by a Court of competent jurisdiction, the prior case involved the same parties and the Judgment in that case was decisive as to any matters put in issue or any matters which might have been put in issue. See: *Georgia Code Annotated* §110-501.

Petitioner's entire analysis is inappropriate since it ignores the fact that the Doctrine of Res Judicata is controlled by State law. Petitioner attempts to circumvent this requirement by contending that the dismissal for



failure to state a claim upon which relief can be granted was in fact jurisdictional. That argument is totally unsupportable since to rule that the dismissal was jurisdictional deprives the section relating to dismissal for failure to state a claim of any meaning.

The great weight of Georgia decisions and decisions of this Court decide the present issue adversely to the Petitioner and call for an affirmance of the Opinion below.

## ARGUMENT

### I.

### The Court Below Was Correct In Ruling That The Present Action Is Barred By The Doctrine Of Res Judicata And Granting Motions For Summary Judgment In Favor Of The Respondents Identified Herein And Dismissing The Present Action.

*(A) IN A DIVERSITY ACTION IN THE UNITED STATES DISTRICT COURT, THE ISSUES OF RES JUDICATA, COLLATERAL ESTOPPEL, AND ESTOPPEL BY JUDGMENT ARE GOVERNED BY THE APPLICABLE STATE LAW.*

It has now been uniformly established that in a diversity case, the law of the State where the District Court sits controls the issues of res judicata and collateral estoppel. See the Fifth Circuit case of *Breeland v. Security*

*Insurance Company of New Haven, Connecticut*, 421 F.2d 918 (5th Cir. 1969); and the Eighth Circuit case of *Richie v. Landau*, 475 F.2d 151 (8th Cir. 1973). Finally, see the Fifth Circuit case of *Janelle v. Sea Board Coastline Railroad*, 524 F.2d 1259 (5th Cir. 1975). Not only is Georgia Law applicable; Respondents will demonstrate that the applicable Georgia Law prevents the maintenance of this second action by the Petitioner, Pleasant Richard Tally.

Petitioner's Statement of the Case, Reasons for Granting Writ, and Conclusion are self-defeating in this regard. Petitioner states the issue this way:

> I. Whether dismissal of a suit under 42 U.S.C.A. for failure to establish the existence of state action should be construed as a dismissal for lack of jurisdiction under F.R.C.P. 41(b) such that a second suit based on similar facts would not be barred by the doctrine of res judicata?

The fallacy in this Statement of the Issue is that the matter is controlled by State law, a matter which the Petitioner never addresses.

The issue contains a further fallacy in that it would have this Court simply convert a dismissal for failure to state a claim upon which relief could be granted into a dismissal on jurisdictional grounds. There is absolutely no authority for the treatment of the dismissal in this



manner and the original Order of the Trial Court in the first action makes it abundantly clear that the dismissal was a dismissal upon the merits for failure to state a claim upon which relief could be granted, and not a dismissal for lack of jurisdiction. (R-343)

*(B) APPLICABLE GEORGIA LAW ON THE DOCTRINES OF RES JUDICATA, COLLATERAL ESTOPPEL AND ESTOPPEL BY JUDGMENT SERVE AS A BAR TO THE PRESENT ACTION BY THE PETITIONER.*

The applicable statute in Georgia on the issue of res judicata is *Georgia Code Annotated* §110-501, which provides:

> "A Judgment of a court of competent jurisdiction shall be conclusive between the same parties and their privies as to all matter put in issue or which, under the rules of law, might have been put in issue, and the cause wherein the Judgment was rendered, until such Judgment shall be reversed or set aside."

A brief analysis of the present situation will demonstrate that the requirements of the *Code* section have been met in every respect.

1.

There is, in the present case, a Judgment of a Court of competent jurisdiction. The Georgia statute requires such a Judgment. The fact that there is a prior Judgment is not subject to dispute. (R-343)

In his Brief, Petitioner contends that the prior Judgment constituted only a jurisdictional decision and was not a decision on the merits. This is an effort by the Petitioner to confuse this Court by contending that the dismissal in the original suit was jurisdictional only. Petitioner is simply grasping at the word "jurisdictional" because the Trial Court used the term in its first Opinion in concluding that the State Court Judge had jurisdiction to entertain a divorce proceeding. The Order in the original case reveals on its face that the dismissal was a dismissal on the merits for failure to state a claim upon which relief could be granted and not a dismissal based upon an absence of jurisdiction in the court. (R-343)

Petitioner's position cannot be sustained under applicable Georgia law or under the Federal Rules. Georgia Courts construing the *Code* sections cited above have concluded that a dismissal for failure to state a claim upon which relief can be granted is a dismissal upon the merits and consequently a bar to any subsequent action arising from the same set of facts. In the case of *Adams v. Travelers Insurance Company*, 114 Ga.App. 276 (1966), the Court of Appeals for the State of Georgia was confronted with a case similar to the present one. A first action in that case had been dismissed for a failure to state a claim upon which relief could be granted. On the issue of res judicata, the Court concluded:

> "The Order of March 5, 1965, dismissing the plaintiff's first suit constituted an adjudi-



> cation on the merits that the plaintiff's petition did not state a cause of action for any relief, legal or equitable, arising out of the facts therein, and since the plaintiff's second suit was clearly predicated upon the same cause of action and was between the same parties, the Trial Court did not err in sustaining the defendant's plea of res judicata."

It is clear that under Georgia law, a dismissal of a case for failure to state a claim upon which relief can be granted is an adjudication of a case on its merits and not a jurisdictional ruling.

Moreover, the applicable Federal Rule resolves the question beyond all doubt. *Rule 41(b)* of the *Federal Rules of Civil Procedure* provides:

> "Unless the Court, in its order of dismissal, otherwise specifies, a dismissal under this subdivision and any dismissal not provided for under this Rule other than a dismissal for lack of jurisdiction, improper venue, or for failure to join a party under Rule 19, operates as an adjudication on the merits."

The Fifth Circuit has construed this *Rule* to embrace cases which have been dismissed for failure to state a claim for which relief can be granted. In the Fifth Circuit case of *Hall v. Tower Land & Investment Company*, 512 F.2d 481 (5th Cir. 1975), this Court concluded:

> "The trial court's dismissal of Hall's first complaint under the Federal Rules of Civil Procedure 12(b) falls directly under the wording of Rule 41(b), and cases have held that such decisions operate as adjudications on the merits."

Consequently, whether looking to the applicable Georgia law or to the *Federal Rules of Civil Procedure*, it is clear that the first requirement of the Georgia statute on res judicata has been satisfied. There is a Judgment by a Court of competent jurisdiction and under all existing authorities, that Judgment constituted an adjudication of the first case on its merits.

2.

The Georgia statute provides that a prior Judgment is conclusive between the same parties and their privies. There can be no question that this portion of the Georgia res judicata statute is also satisfied. The pleadings reveal on their face that the plaintiff in the original action in the Northern District of Georgia (Civil Action Case No. C77-359 A) was Pleasant Richard Tally and the defendants were William P. Johnson, Homer Williams, Aubrey W. Gilbert and Lamar Knight. (R-335) Likewise, the pleadings in the present action (Civil Action Case No. C77-2008 A, in the District Court) reveal on their face that the plaintiff is also Pleasant Richard Tally, and that the defendants are William P. Johnson, Aubrey W. Gilbert and Homer Williams. (R-5) Only State Court Judge Lamar Knight



has been excluded as a party in this second action. Consequently, the identity of the parties requirement has clearly been met.

3.

Under the Georgia res judicata statute, a prior Judgment is conclusive not only as to all matters put in issue, but as to all matters which might have been put in issue under the rules of law.

It is in this area that the Petitioner has demonstrated a consistent inability to understand the doctrine of res judicata. While the Petitioner has never denied that both of these actions center around and arise from the same set of facts and the same transaction, the Petitioner insists that he is entitled to maintain both because he labeled them with separate theories. Under the Georgia res judicata statute, that argument becomes immaterial. Under that statute, the Petitioner was bound not only by the legal theory he litigated in the first action, but by any other legal theory he could have litigated arising from that same set of facts. It is of no consequence that Petitioner's first claim was styled as a civil rights action and his second claim purports to proceed under fraud and related theories. That was the ruling of the Court below. (R-944)

A brief comparison of the two Complaints reveal that they are identical in every respect except for what the Petitioner has chosen to call them. (R-5, 335) All the parties in the present action were parties in the first ac-

tion. Both Complaints center around an alleged ownership interest in the same corporation by the Petitioner. Both Complaints assert a scheme of fraud and conspiracy to defraud on the part of all the Respondents. Both Complaints contend that the Petitioner was deprived of his stockholder interest and his right to earn a living as a result of alleged fraud. Both Complaints allege that all the damages arose out of a divorce action heard by Judge Lamar Knight in the Superior Court of Carroll County, Georgia. Both Complaints allege a firing of the Petitioner from his corporation by the Respondent, William P. Johnson. Both Complaints contend that the Petitioner was illegally restrained from entering the premises of Style Crest and allege a scheme of fraud between the Respondents to acquire the assets of Style Crest by purchase at a Federal Tax Sale. Both Complaints allege misrepresentations by the Respondents during the divorce proceedings and both allege fraudulent statements contended to have been made by all of the Respondents. Finally, in both Complaints, the prayers for relief are substantially the same, although they have been inflated in the second suit. (R-5, 335)

In short, both Complaints arose from the same factual situation and the same transaction. They are identical in every regard and that has never been denied. Even if the Petitioner did have a claim based upon fraud separate from the fraud upon which he purported to base his civil rights action, he was required under the Georgia res judicata statute, to have raised those claims in the first action.



The Georgia Supreme Court expressed the position of the Respondents best in the case of *Turner v. Harper*, 234 Ga. 891 (1975):

> "No party, plaintiff or defendant, is permitted to stand his case before the court on some of its legs, and if it falls, set it up again on the rest in a subsequent proceeding, and thus evade the bar of the former judgment."

That is precisely what the Petitioner seeks to do in the present action. If the Petitioner had other theories, upon which his case rested, he was bound to have presented those theories to the Court in the first action. His failure to do so prevents him from raising those theories at this point. Petitioner has yet to provide this, or any other Court, with any explanation for why he could not have included the present claims in the first action filed by Petitioner. The Federal Court clearly had diversity jurisdiction at that point, just as it has diversity jurisdiction now, since the same parties were involved. In the 1976 case of *Henderson v. Marta*, 236 Ga. 849 (1976), the Supreme Court concluded:

> "The judgments above referred to are res judicata of all issues which were included or might have been included in those actions. [*Code* 110-501] Henderson's pleadings and evidence in the present case do not show that his present motion to set aside the judgment deciding the validity of the referendum raises

any issue which could not have been included in the previous action. It was not in error for the Judge to validate the bonds while this motion to set aside was pending."

The essential point made by the previous case is that the pleading and evidence in the present case do not show that the present complaint contains any issue which could not have been raised in the previous action.

In other cases the Courts of this State have made it abundantly clear that where a second suit touches the same subject matter as a prior suit, *Georgia Code Annotated* §110-501 operates to prevent the second suit. In *Miami Properties, Inc. v. Fitts*, 226 Ga. 300, the Supreme Court concluded:

"The instant suit is between the same parties or their privies, and involves the same subject matter and substantially the same prayers for relief as were in an earlier case. Therefore, it was not error to sustain the pleadings of res judicata."

See Also: *Meyers v. United Service Auto Association, Inc.*, 130 Ga.App. 357 (1973); and *Colodny v. Krause*, 136 Ga.App. 379 (1975).

The Fifth Circuit in construing a statute identical to Georgia's (the Texas Statute) has reached the same



conclusion drawn by the Respondents in the present case. In *Hall v. Tower Land & Investment Company*, 512 F.2d 481 (5th Cir. 1975), the Court concluded:

"Even if Hall had pleaded only the trust theory of recovery in her first complaint, res judicata would still prohibit re-litigation of her claim on a quiet title theory in a subsequent action. For in both Federal Courts and Texas State Courts, a judgment is final not only as to all matters which were decided, but also as to all matters which might have been tried."

That case is identical in every respect to the present case. The Petitioner's efforts to change theories in seeking recovery from the same transaction was rejected and barred under the doctrine of res judicata. For another Fifth Circuit case, see *Acre v. Airline Pilots Association*, 390 F.2d 199 (5th Cir. 1968), in which the Court concluded:

"Thus the civil action relied on in the second litigation, and the one here, are identical. The remedy requested is also identical. True the identical words have not been used; the complaints were prepared by different lawyers, but essentially they are the same. What difference exists is in form, and we have long held that in determining res judicata, it is the substance of the action that counts. What is important and determinative now as to the

identity of causes of action is not an identity of form, but of grounds."

Petitioner's position in the present matter is totally untenable. Petitioner has never denied that both of these cases arise from the same set of facts. That both cases do arise from the same set of facts is apparent on the face of both complaints. Consequently, under all existing state and federal authority, the Petitioner was bound by the judgment in the first action as to any issues litigated in that action, and any issues which he might have litigated in that action.

4.

Under the Georgia res judicata statute, a prior judgment is conclusive until it is reversed or set aside. This may be dealt with summarily since the judgment Respondents contend bars the present action has been neither reversed nor set aside. In fact, the first action terminated when the United States Supreme Court denied Certiorari.

In brief summary of this portion of Respondents' Brief, every requirement of *Georgia Code Annotated* §110-501 has been satisfied for purposes of asserting the conclusiveness of the prior judgment in the first action filed by Petitioner. There is a judgment by a Court of competent jurisdiction between these same parties which has not been reversed or set aside, and which is conclusive upon the Petitioner as to all matters put in



issue and all matters that the Petitioner could have put in issue at that time.

*(C) THE PETITIONER'S LIMITED AUTHORITY DOES NOT SUPPORT HIS ARGUMENT AND HIS RELIANCE ON THAT AUTHORITY IS MISPLACED.*

The Petitioner's reliance on what little authority he cites is misplaced. Petitioner cites *Stump v. Sparkman*, 98 S.Ct. 1099 (1978), for the proposition that this Court could construe the dismissal for failure to state a claim upon which relief could be granted as a dismissal on jurisdictional grounds. *Stump v. Sparkman*, supra, cannot possibly be used for that proposition. That case addresses that issue of jurisdiction in a totally different vein. In *Stump v. Sparkman*, supra, the Court concludes only that the Judge was acting within his jurisdiction in rendering the Order of sterilization and therefore his immunity remained intact. That case does not address or purport to address the proposition asserted by the Petitioner in the instant matter.

The remaining cases cited by the Petitioner merely conclude that once a case has been dismissed on some procedural grounds in Federal Courts, that the plaintiff may be left to pursue whatever remedies may exist in the State Courts. The key words here are "whatever remedy may exist." As indicated by the great weight of authority and analyzed in this Brief, no remedies exist for the Petitioner in the present case by virtue of the operation of Georgia's res judicata statute as embodied in *Georgia Code Annotated* §110-501.

For all the foregoing reasons, Respondents respectfully submit that the decision of the Court below was proper and should be affirmed.

## CONCLUSION

The Respondents submit that the Trial Court below correctly decided the issue and disposed of the case on the theory of res judicata. As the Trial Court points out, the issue of res judicata is controlled by applicable State law and under applicable State law, the present action is clearly barred by the decision on the merits in the first action which was identical in nature. There is absolutely no authority for Petitioner's circuitous effort to have this Court construe the dismissal for failure to state a claim upon which relief could be granted as a dismissal on merely jurisdictional grounds.

For the foregoing reasons the Respondents respectfully submit that the decision of the Trial Court granting the Respondents' Motions for Summary Judgment should be affirmed.

Respectfully submitted,

TISINGER, TISINGER & VANCE

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## CERTIFICATE OF SERVICE

We hereby certify that three copies of the above and foregoing Brief of Appellees, William P. Johnson, Aubrey W. Gilbert and Homer Williams, have been forwarded to counsel for the Appellant, to-wit:

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and

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by mailing the same in the U.S. Mail, First Class, with the proper postage affixed thereon and properly addressed.

This the ____ day of August, 1979.

TISINGER, TISINGER & VANCE

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